UNITED
NATIONS

AT

Administrative Tribunal

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25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 848

Case No. 936: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Rubina Khan, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1995 and to 31 March, 30 June and 30 September 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 June 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 August 1996, the Applicant filed a corrected application, requesting the Tribunal to rule that:

"(i) The JAB [Joint Appeals Board] erred in finding that the Administration had made no binding commitment to promote the Applicant to the P-5 level.

(ii) The Applicant's right to due consideration to fill a P-5 post, number UNA-11110-E-P-5-002, was violated when the said post was given to an outside candidate without advertisement and without offering the Applicant any explanation.

(iii) In the absence of an up-to-date performance evaluation report (PER), the Applicant's candidacy

* Re-issued for technical reasons.

was not properly reviewed and her merit not properly considered by the APB [Appointment and Promotion Board].

(iv) For want of proper consideration of the Applicant's candidacy for promotion to the P-5 level, the decision of the APB not to include her in the 1992 promotion register cannot stand.

(v) The Secretary-General erred in upholding the JAB's recommendation not to support the appeal.

(vi) There is a special burden of proof on the Respondent as a result of the Applicant's gender which was not discharged.

7. Accordingly, the Applicant prays the Tribunal to order (a) that she be fully and fairly considered for promotion to the P-5 level at the earliest possible date; and (b) the Respondent to compensate her in the amount of $35,000 for personal injury, humiliation and stress suffered as a result of [the] unfair treatment she has received."

Whereas the Respondent filed his answer on 6 February 1997;

Whereas the Applicant filed written observations on 10 March 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 24 April 1977, on a one year, fixed-term appointment, as an Associate Expert (General Economics) at the L-1, step II level in Georgetown, Guyana. Her contract was subsequently extended until 16 February 1981, when she became an Associate Officer, at the P-2, step IV level, on a six-month fixed-term appointment, in the Office of the Director-General (ODG) for Development and International Cooperation at Headquarters. Her fixed-term appointment was extended until 15 November 1982, when it expired and the Applicant separated from service. On 13 December 1982, the Applicant was given a consultancy contract until 12 February 1983. This was converted into a short-term appointment until 12 August 1983, when

she separated from service. With effect from 13 April 1984, the Applicant was given a two-year, fixed-term appointment as an Economic Affairs Officer, at the P-3, step I level in the ODG for Development and International Cooperation. Her appointment was successively extended, and, on 1 April 1987, she was promoted to the P-4 level. On 1 August 1989, the Applicant's appointment was converted to probationary and, on 1 April 1991, to permanent. On 15 September 1992, the Applicant was assigned to the United Nations Operation in Mozambique.

On 1 May 1991, the Applicant wrote to the Director-General for Development and International Economic Cooperation (DIEC), requesting that she be recommended for promotion to the P-5 level, claiming that (i) "ever since [she] had been in the Director-General's Office [she] had been placed against a P-5 post", (ii) the Office had indicated that "it was justified to promote her to P-4 against a P-5 post because [she] was in fact performing [her] functions at the P-5 level" and (iii) she had been at the P-4 level since 1987 and her performance had been rated "very good".

In a Note for the File dated 27 February 1992, the Director-General for DIEC recorded that the Applicant had been working in that Office since 1981, was "extremely intelligent and ha[d] a special capacity to immerse herself completely in whatever duties [were] assigned to her", and "deserve[d] to be promoted to a higher grade which so far had not been possible as the Office did not have a P-5 post." He concluded by "strongly recommend[ing] that [the Applicant] be favourably considered for promotion at the earliest opportunity".

An ODG/DIEC Staffing Situation table as of 1 March 1992 listed the Applicant on post number UNA-28833-E-P-4-003, a "post on loan" from and to be returned to the Department of Administration and Management. It further stated that she was to encumber post number UNA-11110-E-P-5-002 when the staff member holding that post would be seconded to UNDP in April 1992. This "solution" also was

reflected in a memorandum dated 28 February 1992 from the Director of DIEC to the Executive Officer.

In a handwritten note dated 26 May 1992, to the Chief of Staff of the Under-Secretary-General of the Department of Economic and Social Development (DESD), the Director, DIEC, wrote that he had "been able to secure all records" pertaining to the Applicant. He added that: "As you can see[,] she has received an unfair deal first on the question of the private arrangement over ... her post and now in regard to her status. I should be most grateful if you could urgently assist [her] in resolving the situation". In another handwritten note of the same date to the Director of Personnel, the Director, DIEC, wrote: "I think [the Applicant's] case merits urgent and sympathetic consideration. She has received an unfair deal both in regard to her post in DIEC and now with regard to her status. I discussed this with ... the Chief of Staff of [the Under-Secretary-General of DESD], who promised to look into the matter. I have sent him the attached papers. I should be grateful if you could assist in redressing this anomalous situation".

Not having been included in the 1992 Senior Officer (P-5) Promotion Register, on 29 July 1993, the Applicant instituted a recourse procedure in accordance with information circular ST/IC/1993/35, requesting the APB to review her case for promotion from the P-4 to the P-5 level.

On 8 September 1993, the Applicant wrote to the Executive Officer, Department for Policy Coordination and Sustainable Development (DPCSD), transmitting her 29 July 1993 recourse letter and requesting "that [her] P-5 post be restored and action should be initiated to ensure that [she] be placed against post #UNA-1110-E-P-5-002".

On 29 October 1993, the Executive Officer, DPCSD, wrote to the Applicant, stating that she had been assigned to DPCSD with effect from 1 April 1993, against a P-4 level post and that "[t]he

points raised in [her] memorandum predate [her] DPCSD assignment and [were] not within [that] Department's purview".

On 4 November 1993, the Applicant wrote to the Secretary-General, requesting administrative review of the decision not to place her against a P-5 post in her department (DPCSD).

In a letter dated 17 November 1993, the Chairperson of the APB advised the Applicant that "notwithstanding the additional information presented in [her] communication, the Board's re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision".

On 15 February 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against "the administrative decision not the place [her] against a P-5 post in [her] department." The JAB adopted its report on 25 April 1995. Its considerations and recommendations read, in part, as follows:

> "Considerations
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> A. Receivability
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> ...
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> 21. The Panel observed that the subject appeal involves two aspects, namely, (a) the Organization's failure to place the Appellant against a P-5 post and (b) the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register.
>
> 22. With respect to the Appellant's claim regarding the Organization's failure to place her against a P-5 post, the Panel observed that the Appellant had been placed against a P-5 post in 1987, the same year that she had been promoted to the P-4 level. In July 1990, however, the Appellant had been removed from this post and placed against a P-4 post, a change which the Appellant acknowledged that she became aware of in 1991. The Panel further observed that the Appellant has since held only P-4 posts. Noting the above requirement that an appeal must be directed against an administrative decision, the Panel found that, other than the administrative decision to remove the Appellant from the P-5 post and place her against a P-4 post in 1990, against which an appeal would

be time-barred under staff rule 111.2(a), the Administration had made no administrative decision regarding the placement of the Appellant against a P-5 post. The Panel accordingly determined that this aspect of the Appellant's case was not receivable.

23. With respect to the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register, the Panel observed that the Chairperson of the APB had advised the Appellant by letter dated 17 November 1993 that the Board had given 'full and careful consideration' to her recourse letter of 29 July 1993 and found that, 'notwithstanding the additional information presented in [her] communication, [its] re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision'. The Panel considered such letter to constitute an 'administrative decision' against which the Appellant could appeal. The Panel accordingly considered the merits of this aspect of the Appellant's case.

B. The Substance of the Appeal

...

25. In the present case, the Appellant's name did not appear on the 1992 P-5 Promotion Register (ST/IC/1993/35) (24 June 1993). On 29 July 1993, the Appellant instituted a recourse procedure in accordance with Information Circular ST/IC/1993/35 against the non-inclusion of her name in the Register. ...

26. The Panel found that the Appellant had not alleged nor provided evidence of prejudice or any other extraneous factor leading to the 17 November 1993 decision of the APB not to include her name in the 1992 P-5 Promotion Register. Accordingly, the Panel found no justification for the Appellant's challenge against such decision on these grounds. While not sufficient to vitiate the APB's decision, the Panel did consider it unfortunate that the Appellant, and thus the APB, did not have PERs on her performance during the three years preceding her consideration for promotion to the P-5 level. The Appellant's most recent PER at that time covered the period from April 1989 through April 1990. The Panel considered that the lack of more recent PERs might have hindered the APB in its review.

27. The Panel next considered whether there had been 'a legal obligation binding on the Secretary-General' with respect to the promotion of the Appellant to the P-5 level. See, e.g., Judgement No. 134 (Furst).

...

30. ..., the Panel found that the Administration had made no binding commitment to promote the Appellant to the P-5 level. The Panel, however, considered it unfortunate that the Appellant, as early as 1992, was given reason to believe that she would be 'favourably considered for promotion [to the P-5 level] at the earliest opportunity' and yet, more than three years later, she had not received such a promotion. As the Administrative Tribunal has stated, 'the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling ...'. Judgement No. 444 (Tortel). The Panel further noted that the restructuring of first DIEC and then DESD might have had a detrimental effect on the Appellant's situation.

31. The Panel trusts that the Appellant will receive the full and fair consideration to which she is entitled for promotion to a vacant P-5 post for which she is qualified. In this respect, the Panel noted the applicability of the special measures to improve the status of women in the Secretariat set forth in ST/AI/382 (3 March 1993).

Recommendation

32. In light of the Panel's foregoing considerations, the Panel makes no recommendation in support of the subject appeal".

On 1 May 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has noted that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to take no further action on your case.

The Secretary-General has also taken note of the comments of the Board in paragraph 31 of its report and confirms that you will receive full and fair consideration, along with other applicants, for promotion to a vacant P-5 post for which you apply and are found to be qualified, and with due regard also to the applicability of the special measures to improve the status of women in the Secretariat set forth in administrative instruction ST/AI/382".

On 19 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given due consideration for a promotion to the P-5 level and, hence, the recommendation of the APB not to include her name in the 1992 Promotion Register cannot stand.

2. By not promoting her to the P-5 level, the Organization violated the promises made to the Applicant by senior managers on which she had relied to her detriment.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal against the administrative decision to remove her from a P-5 post and place her against a P-4 post is time-barred and, if not time-barred, did not violate her rights.

2. The Applicant failed to identify another administrative decision, besides that of July 1990, which may be a subject of her appeal.

3. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-inclusion in the Promotion Register.

4. The Administration did not make a binding commitment to promote the Applicant.

The Tribunal, having deliberated from 28 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General to accept the recommendation of the Joint Appeals Board (JAB) that the Applicant was not wrongfully denied promotion to the P-5 level. The Applicant argues that, contrary to the views expressed by the JAB, the Administration had made a binding commitment to promote her to the P-5 level. Furthermore, she contends that her right to due consideration to fill P-5 post number UNA-11110-E-P-5-002 was violated when the post was filled by an external candidate. Consequently, the Applicant asks the Tribunal to order that she be fully and fairly considered for promotion to the P-5 level and that she be compensated for the personal injury and stress suffered as a result of the unfair treatment she received from the Administration.

II. At the outset, the Tribunal must deal with the issue of a time-bar of the Applicant's claim that her non-placement in a P-5 post violated her rights. The Tribunal notes that the Applicant had been placed in the P-5 post in 1987, the year she had been promoted to the P-4 level. In July 1990, the Applicant was removed from this post and placed in a P-4 level post. It appears that the Applicant became aware of this change of placement only in 1991. At that time, the Applicant could have availed herself of the recourse procedures established by staff rule 111.2. This rule allows an appeal from an administrative decision, "within two months from the date the staff member received notification of the decision in writing". The decision to remove the Applicant from a P-5 post and to place her in a P-4 post was taken at least one and a half years before the date of her appeal. The Tribunal therefore finds that

with respect to this claim, the Applicant's appeal is time-barred. Accordingly, the Tribunal has not considered the merits of this claim.

III. The second and more important issue in this case is whether the Applicant's rights were violated for want of proper consideration of her candidacy for promotion to the P-5 level. Further, the Tribunal must consider whether there was a binding promise to promote the Applicant to the P-5 level.

IV. The Applicant contends that in May 1991, she received an oral promise from the Director-General for Development and International Economic Cooperation (DIEC) to promote her to the P-5 level. In support of this contention, the Applicant refers to a Note for the File dated 27 February 1992, which recommends the Applicant for promotion and asks that consideration be given to this issue. However, the Note does not contain a binding promise to promote the Applicant. Accordingly, the Tribunal is unable to conclude that a binding commitment existed to promote the Applicant.

V. Next, the Tribunal must consider whether the Applicant's rights were violated by the manner in which the P-5 post, to which the Applicant claims she should have been assigned, was filled. The Tribunal notes that the P-5 post the Applicant was seeking was filled by an external candidate through what is alleged to have been a "private arrangement", without having been advertised. This appears to be a violation of staff regulation 4.4 which reads as follows:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

VI. The Tribunal has held on numerous occasions that staff members already employed by the United Nations have a right to the fullest consideration for appropriate vacancies. The breach of staff regulation 4.4. constitutes a violation of the Applicant's rights. (Cf. Judgements No. 310, Estabial (1983) and No. 362, Williamson (1986)). The manner in which the post was filled deprived the Applicant of her right to due consideration for promotion to the P-5 level. The Tribunal considers that, in accordance with its jurisprudence, the Applicant had a statutory right to due consideration of her candidature for post number UNA-11110-E-P-5-002. The failure of the Administration to do so violated her rights and she is therefore entitled to compensation.

VII. In addition, the Tribunal considered whether the fact that there was no up-to-date PER violated the Applicant's rights to full and fair consideration for promotion to the P-5 level. The Tribunal has repeatedly held that the Organization must comply with its own procedures, which include the timely evaluations of a staff member's performance. "It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the ... Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged." (Cf. Judgement No. 586, Atefat (1992)). For this, the Applicant is also entitled to compensation.

VIII. For the foregoing reasons, the Tribunal orders the Respondent:

1. To consider the Applicant fully and fairly for promotion to the P-5 level as soon as possible; and

2. To pay the Applicant an amount equal to four months of her net base salary, at the rate in effect on the date of this

judgement, as compensation for the procedural irregularities set forth in paragraphs VI and VII above.

IX. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary